

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FIRST REGION**

In the Matter of

COMMUNITY LIVING ASSOCIATION

Employer<sup>1</sup>

and

MAINE STATE EMPLOYEES  
ASSOCIATION, SERVICE EMPLOYEES  
INTERNATIONAL UNION LOCAL 1989,  
AFL-CIO-CLC

Petitioner

Cases 1-RC-21862  
1-RC-21863  
1-RC-21864

**DECISION AND DIRECTION OF ELECTION**<sup>2</sup>

Community Living Association (CLA) is an organization that provides services to mentally retarded individuals in the State of Maine. The Petitioner seeks to represent CLA employees in three separate bargaining units, one unit for the employees employed in CLA's intermediate care facilities for the mentally retarded (ICF/MRs), a second unit

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<sup>1</sup> The name of the Employer appears as amended at the hearing.

<sup>2</sup> Upon three petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a consolidated hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

I grant the Employer's motion to reopen the record to admit, as Employer Exhibit 26, the Employer's complete personnel policies, which motion was unopposed by the Petitioner.

for employees employed in CLA's assisted living program, and a third unit for employees employed in CLA's day programs. CLA asserts that there should be one agency-wide bargaining unit.<sup>3</sup> I find that the three separate units sought by the Petitioner are inappropriate and that the smallest appropriate unit is an agency-wide unit.

CLA asserts that either the agency-wide unit or the ICF/MR unit must include its qualified mental retardation professional (QMRP) and its director of social services. The Petitioner would exclude both the QMRP and director of social services from any unit found appropriate on the grounds that they are professional employees and/or managerial employees and on the ground that they otherwise lack a community of interest with the petitioned-for employees. The Petitioner would exclude the QMRP on the additional ground that she is a statutory supervisor. I find that the QMRP is not a statutory supervisor and that neither the QMRP nor the director of social services are managerial employees. I further find that they share a sufficient community of interest with the petitioned-for employees to require their inclusion in the unit. However, because the record is insufficient for me to make a determination as to their professional status, I shall permit them to vote under challenge.

### **APPROPRIATE UNIT**

CLA, which is located in Houlton, Maine, is a nonprofit agency that operates programs for approximately 195 mentally retarded "consumers."<sup>4</sup> Its executive director, Ron Langworthy, reports to a board of directors. Langworthy and various other administrators<sup>5</sup> work at CLA's central office on School Street in Houlton. All of its facilities, with two exceptions, are located within a few miles of one another in Houlton.

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<sup>3</sup> According to the Petitioner, there would be approximately 40 employees in the ICF/MR unit, 88 employees in the assisted living unit, and 45 employees in the unit of day program employees, for a total of 173 employees. It is unclear if those numbers include employees who work in more than one program. CLA asserts that there would be approximately 150 to 180 employees in an agency-wide unit. The Petitioner is willing to proceed to an election in an alternate unit should I find the three separate petitioned-for units to be inappropriate.

<sup>4</sup> This is the term that CLA uses to refer to its clients.

<sup>5</sup> The parties have stipulated, and I find, that the following positions shall be excluded from any unit found appropriate: executive director, director of the day program, QAP/interim director of the day program, director of residential services for assisted living, director of residential services for ICF/MR, assistant administrator for ICF/MR, housekeeping supervisor, dietary supervisor, director of nursing, maintenance supervisor, supported employment coordinator, director of human resources, human resources assistant, human resources trainer I and II, executive assistant, bookkeeper, billing coordinator, office manager, secretary, information systems manager, financial manager, DT, case manager, habilitation supervisor, home managers, and client/employees.

## ICF/MR Facilities

The Employer operates two ICF/MR facilities, Harmony and Forest Springs. ICF facilities are considered to be the “medical” model for the care of the mentally retarded and were the basic model for care through the early 1990s. Harmony and Forest Springs are located adjacent to one another. Each has a dining room, two large living rooms, and two wings with rooms for consumers. Harmony services consumers who need at least eight hours per day of nursing care, while Forest Springs consumers do not have severe medical needs. There are twelve consumers at Harmony and eight at Forest Springs.

Director of Residential Services for ICF/MR Rob Moran, who reports to Langworthy, oversees Harmony. Assistant Administrator Brenda Cummings, who reports to Moran, oversees Forest Springs. The direct care workers at Harmony and Forest Springs are called resident assistants (RAs), developmental trainer assistants (DTAs), and shift leaders.<sup>6</sup> Because of the medical needs of the Harmony consumers, its direct care staff are required to be certified nursing assistants (CNAs), although they have the same titles of RA, DTA, and shift leader as the employees at Forest Springs. The RAs, DTAs, and shift leaders report to developmental trainers (DTs), who report, in turn, either to Moran at Harmony or to Cummings at Forest Springs. Harmony and Forest Springs must be staffed 24 hours a day, seven days a week. The staff work various shifts, ranging from three to twelve hours long.

Each facility has both housekeeping/laundry workers and cooks who prepare meals. These employees report to the housekeeping/laundry supervisor and dietary supervisor, who report, in turn, to Moran. Harmony employs LPNs who monitor the consumers’ medical needs. They report to a director of nursing who reports, in turn, to Moran. Forest Springs employs LPN service coordinator Cindy Folsom, who reports to Cummings, and monitors the consumers’ medical needs at Forest Springs.

Harmony and Forest Springs share the services of a director of social services/licensed social worker (LSW), qualified mental health professional (QMRP),<sup>7</sup> developmental training coordinator (DTC), and individual service assistant. The DTC reports to Moran and schedules the staff for training, runs fire drills, handles petty cash for consumers, and repairs broken adaptive equipment. She works from 8 a.m. to 4 p.m., Monday through Friday. The individual service assistant, who used to be called an activity coordinator, reports to Moran, and arranges for vacations, special trips, and home visits for consumers.<sup>8</sup>

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<sup>6</sup> RAs are new hires. After a certain amount of training and time in service, RAs become DTAs. Shift leaders run the shift and give direction to DTAs and RAs, but play no role in discipline or performance appraisals. There is no contention that shift leaders are statutory supervisors.

<sup>7</sup> The duties of the director of social services and the QMRP, whose status is in dispute, will be discussed below.

<sup>8</sup> The record does not reveal the parties’ positions regarding inclusion of the individual service assistant. Accordingly, I shall permit her to vote under challenge.

## Assisted Living Program

### Assisted living residences:

In the early 1990's, the state of Maine, which provides most of the funding for CLA's programs, began to encourage service providers such as CLA to develop assisted living residences, which provide care for mentally retarded consumers in a more home-like, community-based environment.<sup>9</sup> CLA's assisted living residences are located in houses that it has purchased in the community. CLA operates seven assisted living homes, each of which houses four consumers.<sup>10</sup>

Residential Service Director Pat Sherman, who reports to Langworthy, oversees the assisted living homes. Employees called home providers provide the direct care in these residences. They report to a home manager, who reports to Sherman. Two of the assisted living homes have clients who do not attend day programs and are staffed 24 hours a day, 7 days a week. The other homes have coverage around the clock, except for those hours on Monday through Friday that the consumers are attending a day program.

### Personal support programs:

CLA also operates personal support programs at four sites that are different from the assisted living residences. Each of the four homes has only one consumer. In some cases, the consumer's behavior is such that the consumer could not successfully have roommates. Personal support services may also be used to serve consumers who need only a few hours of support per week, e.g., assistance with managing their budget. Employees called personal support staff provide the direct care in these settings. Rob Moran, the director of the ICF/MR program, is responsible for overseeing two such programs on Highland Avenue and Elm Street. Home manager Anne Keegan oversees the Highland Avenue and Elm Street homes on a day-to-day basis, and its personal support staff report to Keegan. In the case of the Park Street apartment, the personal

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<sup>9</sup> These residences are sometimes referred to as "waiver" homes, both because consumers or their guardians must be eligible for ICF/MR services and waive their right to them in order to receive assisted living services, and because states receive federal funds for the residences under a "waiver." Langworthy testified that the state of Maine now wants to shift to a model of less expensive care than assisted living called individual service options (ISO). In this model, providers such as CLA would recruit, train, and monitor foster homes for consumers. This model would mean fewer consumers in assisted living. The record does not reveal if or when this model will go into effect.

<sup>10</sup> These are Bangor Road, Corner Home, Duplex North and South, Joseph Street, High Street, Ruth Road, and Park Street. All of the assisted living residences except Bangor Road are located in Houlton, Maine. I take administrative notice of the fact that the Bangor Road facility is located in nearby Linneus, Maine.

support staff report to Park Street Administrator Karri Bennett.<sup>11</sup> The fourth personal support program is located in Bridgewater, about 23 to 25 miles north of Houlton.<sup>12</sup> There, the personal support staff report to Bridgewater Supervisor Jen Patoine.<sup>13</sup>

#### Community guides:

Community guides Jennifer Patoine and Bonnie Wotton report to Sherman. They schedule activities for both assisted living consumers and ICF/MR consumers, such as Special Olympics, bowling, dances, picnics, fishing, and the like. They work 20 hours per week, with flexible hours.

#### Maintenance employees:

The Petitioner seeks to include CLA's maintenance employees<sup>14</sup> in the assisted living unit. The maintenance employees report each day to the office of Maintenance Supervisor Tom Mailman, who works at the central office on School Street. All of the maintenance workers perform maintenance work for all of the CLA facilities, based on work orders. None are assigned to a particular facility or program.

#### Day Program

CLA operates five different day programs that serve close to 100 consumers. These are the Roger Randall Center, the Life Skills Training Program (also known as the Green Center), New Horizons Enterprise at Market Square, New Horizons Enterprise at Main Street, and Supported Employment. The two New Horizons programs provide services for consumers who are somewhat higher functioning than those at the Roger Randall Center or the Green Center. Some of the day program consumers are residents in CLA facilities,<sup>15</sup> while others live with family members or have other living arrangements.

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<sup>11</sup> Bennett also serves as CLA's director of human resources and head trainer.

<sup>12</sup> While CLA owns the houses or apartments in the case of Elm Street, Highland Avenue, and Park Street, CLA does not provide the residence for the Bridgewater consumer; personal support staff provide services in the consumer's own home.

<sup>13</sup> As noted below, Patoine also serves as a part-time community guide, a position that would be included in any unit found appropriate. Although the parties have stipulated to exclude all home managers such as Keegan and to exclude Bennett as director of human resources, there was no stipulation regarding the inclusion or exclusion of Patoine in her capacity as Bridgewater supervisor. Accordingly, I shall permit her to vote under challenge.

<sup>14</sup> These include maintenance workers I and II, an assistant maintenance supervisor, and vehicle maintenance workers.

<sup>15</sup> Seven of the eight consumers at Forest Springs and nine of the twelve consumers at Harmony attend a day program. Twenty-four of the twenty-eight assisted living consumers attend a day

Anne Stevens, the interim director of the day program, reports to Langworthy. The direct care workers at the Green Center are program aides, while the direct care workers at the Roger Randall Center are program aides and team leaders.<sup>16</sup> They report to a habilitation supervisor at each site, who reports to the day program director. The direct care workers at the two New Horizons programs are called community support coaches. They report to New Horizons supervisors at each site, who report, in turn, to the day program director.<sup>17</sup> New Horizons Enterprise at Market Square also employs a full-time facilitator who reports to the day program director. Employees in the day programs work from 8 a.m. to 3:30 p.m., Monday through Friday.

The fifth day program setting is Supported Employment, in which job coaches accompany approximately 20 consumers to their jobs and assist them with job-related skills. The job coaches report to a supported employment coordinator, who reports to the day program director.

### Types of Consumers Served by the Three Programs

Consumers served by CLA may have mild, moderate, or profound mental retardation. Some require wheelchairs and/or require the use of a Liko-lift, a piece of equipment used to transfer them. Some can speak, while others have difficulty verbalizing and may require a communication device. Some consumers are self-destructive or violent. There is no distinction between the ICF and assisted living consumers with respect to their degree of developmental disability, and the services provided are the same.<sup>18</sup> Consumers who have mild, moderate, or profound mental retardation, or who need wheelchairs, Liko-lifts, or communication devices, or who have behavioral problems may be served in either type of setting.<sup>19</sup> The day programs also serve consumers with all levels of disability, although, as noted above, the New Horizons programs serve higher functioning clients who do not need assistance with basic care.

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program. For those CLA consumers who do not attend a day program, the ICF or assisted living staff provide a similar program at the consumer's residence.

<sup>16</sup> The Roger Randall Center and the Green Center also employ janitors and drivers who the parties have stipulated should be included in the unit.

<sup>17</sup> Although the parties have stipulated to the exclusion of the habilitation supervisors and the supported employment coordinator, there was no stipulation regarding the inclusion or exclusion of the two New Horizons supervisors.

<sup>18</sup> As noted above, Harmony serves only consumers who have medical problems that require nursing care, regardless of the level of their developmental disability.

<sup>19</sup> Some, but not all, of the assisted living residences are wheelchair accessible. Both ICF/MR facilities are wheelchair accessible.

Each consumer has a “person-centered plan” (PCP) that defines the consumer’s rights, limitations on those rights, and goals. The plan is created by a team composed of the consumer, the consumer’s guardian, a case manager from the Maine Department of Health and Human Services (DHHS), a supervisor or program aide from the day program, and a supervisor from the consumer’s residence. The PCP teams meet quarterly to update the plans. Sometimes direct care staff from the residence attend the meetings as well. The plans may address goals for habilitation, speech, occupational therapy, medical care, and the like. Habilitation plans, also referred to as “programs,” are intended to increase the consumer’s independence as much as possible and vary from consumer to consumer. Programs may include teaching consumers how to brush their teeth, fold laundry, wash dishes, tell time, or make a purchase in the community. The programs may have quantifiable goals, such as “Mike will brush his teeth 50 percent of the time.”

### Licensing of the Facilities

DHHS licenses the ICF/MR facilities and the assisted living residences, which involves an annual inspection for three or four days. The personal support programs are not licensed. The day programs are not licensed separately, but DHHS reviews the day programs insofar as they provide services for CLA consumers. If DHHS finds a problem at one of the day programs with respect to an ICF/MR consumer, that deficiency is noted for purposes of the licensing of the ICF/MR facility and must be corrected. For example, DHHS’s 1995 “Statement of deficiencies” for Harmony noted that feeding programs were not implemented consistently at home and at day programs, that not all adaptive equipment was available at the day program, and that not all individuals were engaged in meaningful activity on the survey dates at the home and at the day program.

Care of the consumers at ICF/MR facilities is highly regulated by detailed manuals that set forth CLA policies regarding matters such as admission, habilitation, nursing and medical services, dietary services, safety issues, and environmental policies. The manual governing the assisted living homes is much less detailed. For example, the Harmony manual requires that there be a certain number of hours between meals, and Harmony staff must get permission from state regulators to vary breakfast time for a consumer who prefers to sleep late in the morning. Meal times at the assisted living residences are not regulated to that degree.

### Employee Duties

The RAs, DTAs, and shift leaders in the ICF/MR facilities perform duties similar to those performed by the home providers in the assisted living residences. In the morning, they assist the consumers with their morning routine. On Monday through Friday, they transport consumers to and from CLA day programs in vans. After the consumers return to their residence, the staff in both settings administer medications, provide snacks, assist consumers with activities of daily living to the degree necessary, accompany them on community outings, and help prepare them for bed. The direct care staff in both settings are responsible for implementing the “programs” in each consumer’s PCP, which may involve giving the consumers “cues” that help them learn how to

perform the tasks at issue as independently as possible, such as toileting, bathing, tooth-brushing, or folding laundry. However, unlike the direct care employees in the ICF/MR facilities, which have cooks and housekeepers, home providers in the assisted living residences cook and serve meals, clean, and do laundry for consumers.<sup>20</sup>

Program aides and community support coaches at the day programs are also responsible for implementing the PCPs and do the same type of programming as is done in the residential settings. They take the consumers on outings to stores, the library, and fast food restaurants. They teach consumers socialization skills, as well as such skills as how to cross the street, how to read street lights, how to use a checkbook, and how to use the library. Because repetitiveness helps consumers learn, they give consumers the same cues as are given by the residential staff.

The QMRP from the ICF/MR facility, who facilitates the PCP meetings for ICF/MR consumers, goes to the day programs once a week to check that ICF/MR consumers are receiving consistent programming at both the day program and the ICF/MR facility. A quality assurance professional (QAP), who facilitates the PCP meetings for the assisted living consumers, performs a similar function for assisted living consumers.<sup>21</sup>

### Employee Contact

The day program employees and the employees of the ICF/MR and assisted living programs have contact with one another on Monday through Friday when the residential staff drop off and pick up consumers from the day program.<sup>22</sup> The day program employees help load the consumers into the vans. They tell the residential staff about how the day has gone for the consumers, and the residential and day staff also pass a “communication log” for each consumer back and forth. The logs detail issues such as medication, toileting, positioning for non-ambulatory consumers, meals, skin care, appointments, and the like. DTAs from the ICF/MR program go to the day programs to administer medications for their consumers, but program aides administer medications for the assisted living consumers. Program aides go over to Harmony to pick up lunch for its consumers; lunch for the assisted living consumers is sent with them. The ICF/MR, assisted living, and day programs borrow CLA vans from one another. The ICF/MR, assisted living, and day program staff have contact when they accompany consumers to events such as parties, picnics, bowling, or Special Olympics.

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<sup>20</sup> The PCP programs of some consumers in both assisted living and ICF facilities may involve teaching them to assist in these tasks.

<sup>21</sup> QAP Ann Stevens, who has an office at CLA’s central office, is, as noted above, also currently the acting director of the day program.

<sup>22</sup> Program aides from the day program transport two consumers who need one-on-one care back and forth from assisted living residences to the day program.



Director of Training Karri Bennett administers training programs for all CLA employees. All new employees are required to undergo the same five-day orientation covering matters such as patient rights, CPR, and first aid. Direct care workers in all three programs are required to attend additional training during their first six months of employment on matters such as handling aggressive clients, prevention of verbal abuse, supporting everyday living fundamentals, and administration of medication.<sup>23</sup> Some training requires annual recertification.

CLA employees from different programs serve together on CLA committees. The CLA safety committee includes employees from Harmony and the day program. The CLA public relations committee includes employees from ICF/MR, assisted living, and the day program.

### Employee Interchange

CLA policy permits employees to hold up to three different CLA jobs, in no more than two programs, at the same time. CLA has sometimes created a combined position such as 20 hours at Forest Springs and 15 hours at a day program. Nineteen CLA employees currently work in more than one program. Of these, six employees are regularly scheduled to work in two different programs<sup>24</sup> and the rest have regularly scheduled hours in one program and work as “call-ins” at another program. Employees who hold more than one job<sup>25</sup> may have different supervisors, anniversary dates, appraisals, wage rates, and raises for each job. They are not entitled to a raise unless they have satisfactory appraisals in both positions. Employees with two jobs accrue earned benefit time for their total hours worked in both jobs. For employees that have two different wage rates, CLA uses a weighted average of the two rates to calculate the employees’ wage rates when they take earned time off. An employee’s hours in both jobs are considered for purposes of calculating eligibility for overtime.

With respect to temporary interchange, apart from the 13 employees who currently work as call-ins for a different program, CLA has, on two occasions, asked employees to fill in at a different program for a few weeks due to staffing shortages. In 2002, Cindy Smith, a program aide from a day program, filled in at Forest Springs for two to three weeks when several of the Forest Springs employees were absent due to

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<sup>23</sup> The Harmony employees, who are CNAs, are not required to take the medication training.

<sup>24</sup> Carlene McQuarrie works regularly scheduled hours in a day program and at the High Street assisted living residence. Laureen Morgan works regularly scheduled hours at Harmony and in an assisted living home. Kirk Ward works regularly scheduled hours in a day program and in personal support. Three employees who work either in a day program or assisted living are also paid out of Harmony funds to accompany Harmony clients to church on Sunday.

<sup>25</sup> It appears that the rules concerning employment in multiple programs apply to employees with regularly scheduled hours in more than one program, but not to employees who sometimes work as a call-in at a different program.

injuries.<sup>26</sup> About a year ago, day program employee Donna Jewel and ICF/MR employee Wendy Henderson filled in at the Joseph Street assisted living residence for six to eight weeks due to leaves of absence by Joseph Street employees.<sup>27</sup>

With respect to permanent transfers, it appears that there are 13 current employees who have transferred their regularly scheduled hours from one of the three programs to another. Five assisted living employees used to work regularly scheduled hours for one of the ICF/MR facilities. Four ICF/MR employees transferred from a day program or assisted living residence. Four day program employees transferred from jobs in assisted living or ICF/MR. According to CLA policy, employees who transfer to a new job within the same program or between ICF/MR and assisted living positions retain their previous wage rate. Employees who transfer between a day program and an ICF/MR or assisted living program will receive the starting rate for the new position.

### Centralization of Labor Relations

CLA's human resources department posts all CLA job openings in all of its facilities. Director of Residential Services Pat Sherman testified that she and the assisted living home managers interview candidates and call references and decide whom to hire without input from higher managers. Cummings testified that at Forest Green, the DTs prepare the performance appraisals for the DTAs and RAs, and she sits in when they are presented. The human resources department is not involved in the performance appraisals unless she has a question.

With respect to discipline, Cummings testified that she and Moran discuss discharge situations with the executive director and director of human resources, and they make a decision together. Neither she nor Moran may make discharge decisions on their own. Cummings may not even issue a written or verbal warning unless the executive director knows about it. In situations involving alleged abuse or neglect of consumers, the director of human resources contacts a state agency, Adult Protective Services, which may direct CLA to investigate the matter. The supervisor who investigates such incidents must be from a different program from the one in which the incident occurred.

Employees may take grievances to a grievance committee that is composed of hourly employees, a program director, a staff member, and a board member. Director of Human Resources Janene Stewart serves as a consultant. The committee members must be employed by a program that is different from the program in which the grievance arose. Grievance committee decisions may be appealed to the board of directors.

CLA's finance manager, Shannon Hogan, prepares the budgets for all three programs. The program directors do not set their employees' wage scale or benefit

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<sup>26</sup> Other individuals who filled in at Forest Springs during this incident were either supervisors or from Harmony, the other ICF/MR.

<sup>27</sup> Jewel and Henderson were nonsupervisory employees.

levels. Any expenditure over \$100 must be approved by Hogan and any expenditure over \$5000 must be approved by Langworthy.

### Wages, Program Funding, and Disparity in Raises

All of the petitioned-for employees are hourly paid and eligible for overtime. The wage matrix, a ten to twelve-step scale, for the direct care employees in the three programs is similar or, in some cases, identical. Both home providers in the assisted living homes and RAs/DTAs in the ICF/MR facilities start at \$8.77 per hour and may ultimately progress to \$12.40 per hour. All three proposed units also include somewhat higher paid employees. For example, the PCP facilitator in the day program earns from \$10.47 to \$13.57 per hour, the community guides in the assisted living program earn from \$10.72 to \$13.59, and the DTC and LPNs in the ICF/MR facilities earn from \$12.14 to \$15.84.

Although the wage scales for the three programs are now similar, the fact that there are different funding mechanisms for the three programs has led to a disparity in raises between the three programs over the years. CLA receives 94 percent of its funding from Medicaid. The state of Maine, which provides the Medicaid funding, uses different reimbursement mechanisms for ICF/MR facilities, assisted living programs, personal support, and day programs. For the last ten years, the ICF/MR facilities have consistently received a cost-of-living increase, while reduced funding from the state forced CLA to declare a wage freeze in November 2003 for employees in the assisted living program and central office, which was lifted in November 2004. Raises for day program employees have also been irregular due to funding problems. Further, ICF/MR employees and assisted living employees get raises, if there are to be any, on their anniversary date, while day program employees all receive raises at the same time, when money becomes available. As a result of the wage freeze in the assisted living program, even though the wage scale for a home provider in assisted living is identical to that of a DTA in ICF/MR, a home provider who was hired on the same day as a DTA would be a step behind the DTA on the wage scale.

### Benefits

CLA employees in the three programs receive the same benefits. All CLA employees who are regularly scheduled to work twenty or more hours per week are entitled to health and dental insurance, life insurance, earned benefit time, a retirement plan, and discounted homeowner's insurance, car insurance, and health club memberships. The hours of employees who hold jobs in two different programs are combined for purposes of reaching the threshold for eligibility for benefits. The same personnel policies apply to all employees.

There is a distinction between the day and residential programs with respect to some days off. The day programs close for certain holidays and in very bad weather,

while ICF/MR and assisted living employees must work on holidays and in bad weather.<sup>28</sup>

### History of Collective Bargaining

In 1988, a different union, the American Federation of Grain Millers, petitioned in Case 1-RC-19155 to represent a unit of all nonprofessional employees employed by CLA, which then included a residential center, a preschool, two group homes, and a day program.<sup>29</sup> The union won the election, but was decertified after one year of bargaining that failed to produce a contract.

### Analysis

It is well settled Board law that a union need not seek to represent the most appropriate unit or most comprehensive unit, but only an appropriate unit. Transerv Systems;<sup>30</sup> Morand Bros. Beverages Co.<sup>31</sup> In determining unit scope, the Board first considers the petitioning union's proposals. If the unit sought is appropriate, the inquiry ends. If it is inappropriate, the Board will scrutinize the employer's proposals. Dezcon, Inc.<sup>32</sup> In deciding whether a unit is appropriate, the Board weighs various factors, including differences or similarities in the method of wages or compensation, hours of work, employment benefits, supervision, working conditions, job duties, qualifications, training, and skills. The Board also considers the degree of integration between the functions of employees, contact with other employees, and interchange with other employees, as well as history of bargaining. Overnite Transportation Co.<sup>33</sup> The petitioner's desire as to the unit is a relevant consideration, though not dispositive. Florida Casino Cruises.<sup>34</sup>

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<sup>28</sup> In the residential programs, CLA may choose not to count an absence against an employee for purposes of its absenteeism policy in the case of inclement weather.

<sup>29</sup> The name of the Employer at that time was Southern Aroostook Association for Retarded Citizens, Inc. It appears from a Decision and Direction of Election in the matter that there was no dispute as to the scope of the unit, although there was a dispute over the supervisory status of the LPNs.

<sup>30</sup> 311 NLRB 766 (1993).

<sup>31</sup> 91 NLRB 409 (1950).

<sup>32</sup> 295 NLRB 109, 111 (1989).

<sup>33</sup> 322 NLRB 723, 724 (1996), citing Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962).

<sup>34</sup> 322 NLRB 857, 858 (1997), citing Airco, Inc., 273 NLRB 348 (1984).

I find that the three separate units sought by the Petitioner are not appropriate and that the smallest appropriate unit is agency-wide.<sup>35</sup> “[T]he Board has consistently refused to set apart as an appropriate unit any subdivision or group of employees the nature of whose work is indistinguishable from that of other employees or whose work is not functionally coherent and distinct.” Triangle Publications, Inc.<sup>36</sup> Requested units must be composed of a well-defined group of employees entitled to separate representation. Moore Business Forms, Inc.<sup>37</sup>

Here, at least one of the units sought, the assisted living unit, does not correspond to an established administrative structure at CLA. In this regard, the personal support employees and the home providers in the proposed assisted living unit report to different second-level supervisors, and those personal support employees who report ultimately to Moran share supervision with the ICF/MR employees. The maintenance employees whom the Petitioner seeks to include in the assisted living unit report to a different location, are separately supervised, and perform work throughout the agency, not just at the assisted living homes. Moore Business Forms, Inc.<sup>38</sup> (unit sought inappropriate where the employees sought do not share the same supervision and they share supervision with employees not requested); Acme Markets, Inc.<sup>39</sup> (three separate statewide units inappropriate where there is no administrative structure corresponding to those units).

CLA’s three programs are functionally integrated in that they serve the very same consumers, who go back and forth daily between the day and residential programs. Representatives of both day and residential programs participate on each PCP team. The QMRP and QAP from the residential programs visit the day programs to ensure that the consumers’ PCP programs are taught to those consumers in a consistent manner in both settings. In the licensing process, the residential programs are held accountable for any deficiencies in the day program that affect their consumers. The three programs share vans. The community service guides whom the Petitioner seeks to include in the assisted living unit plan activities for both assisted living and ICF/MR consumers.

The direct care staff in all three settings perform virtually the same duties and, in the case of the RAs and DTAs in the ICF/MR and assisted living units, share the same job titles. The shifts of the ICF/MR and assisted living program employees are similar in

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<sup>35</sup> In light of my conclusion that an agency-wide unit is the smallest appropriate unit, I need not reach the Employer’s assertion that CLA is a nonacute care health care institution and that the appropriate unit must be determined pursuant to the principles of Park Manor Care Center, 305 NLRB 872 (1991).

<sup>36</sup> 40 NLRB 1330, 1332 (1942).

<sup>37</sup> 204 NLRB 522, 553 (1973).

<sup>38</sup> Id.

<sup>39</sup> 328 NLRB 1208 (1999).

that both settings require around-the-clock coverage, seven days a week. The day and residential employees have contact with one another on a daily basis, both verbally and through the communication logs, when the consumers are dropped off and picked up from the day programs. Employees from the three units attend training together as well as social events for consumers.

Labor relations matters at CLA are very centralized. The central office administrators rather than the program directors set wages and benefits. Employees in all three units are subject to the same personnel policy manual. Although it appears that program directors have authority to hire and to conduct performance appraisals, personnel matters such as discipline and grievance-handling are handled by the executive director or other central office administrators rather than by the program directors. The human resources director posts CLA jobs at every CLA facility. The central office is responsible for developing each program's budget and must approve any expenditures over \$100.

The employees in all three units sought are hourly paid, their wages are similar, and their benefits are identical. Finally, while not overwhelming, there is evidence of some interchange between the three programs. In this regard, of the approximately 150 to 180 employees agency-wide, six have regularly scheduled jobs in more than one program, thirteen currently work regularly for one program and as call-ins for a second program, three have temporarily assisted another program for a few weeks, and thirteen have permanently transferred between programs.<sup>40</sup>

The Petitioner argues that separate units are warranted because, due to different funding mechanisms, employees in the assisted living and day programs have received raises more sporadically than the ICF/MR employees, creating conflicts of interest between the employees in each program. Further, the day program employees receive whatever raises are available on the same date, while the ICF/MR and assisted living employees receive raises on their individual anniversary dates. The Board has held, however, that such differences in method of compensation do not require the establishment of separate units. Four Winds Services, Inc.<sup>41</sup> (fact that wages and benefits of some unit members are governed by the Davis-Bacon Act and some by the Service Contract Act does not destroy their community of interest).

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<sup>40</sup> In concluding that an agency-wide unit is the smallest appropriate unit, I do not rely on the short history of collective bargaining with the Federation of Grain Millers. That union sought to represent the CLA employees on an agency-wide basis. The scope of the unit was not litigated and therefore not addressed in the Decision and Direction of Election. The Board has long held that the appropriateness of a particular unit that has not been litigated in a Board proceeding is not given any weight in a subsequent proceeding where the unit issues are fully litigated. Coca-Cola Bottling, 156 NLRB 450, 452 (1965); Bowman Transportation, 166 NLRB 982, 983 (1967); Vangas, Inc., 167 NLRB 805, 806 (1967).

<sup>41</sup> 325 NLRB 632 (1998).

The Petitioner also asserts that certain other distinctions between the duties and schedules of employees in the three programs warrant separate units. In this regard, the direct care providers in the assisted living program prepare meals, clean, and do laundry for consumers, whereas the direct care providers in the ICF/MR facilities are not required to cook, clean, or do laundry because those duties are performed by other unit employees, housekeepers and cooks. The day program employees work only Monday through Friday during the day and are not required to work on certain holidays or on days when the day programs are closed due to bad weather, while the residential programs must be staffed around the clock and are never closed for holidays or bad weather. Further, the Petitioner asserts that the ICF/MR program is more highly regulated by the state of Maine than the assisted living program. I find, however, that these differences are too insubstantial to support the segregation of employees who generally perform the same duties for the same clients under similar working conditions.

NLRB V. Lake County Association for the Retarded, Inc.,<sup>42</sup> cited by the Petitioner, does not warrant a different result. In that case, the union sought a unit limited to employees who worked in the employer's 34 group homes for the mentally retarded, while the employer asserted that only a "wall to wall" unit including the employees who worked in its five sheltered workshop day programs was appropriate. In a decision upheld by the Board and the Court, the Acting Regional Director found that too many commonalities bridged residential and day services to allow for simply divorcing them, in that the workers did the same work (often side-by-side), with the same education, skills, and training, for similar pay and benefits and under the same overall supervision. The Acting Regional Director resolved the problem by fashioning a unit limited to five hands-on entry-level residential positions,<sup>43</sup> while excluding certain "expert" or ancillary residential positions, such as maintenance workers, that crossed the residential/day divide. The Acting Regional Director excluded the entry-level day service employees from the unit, despite the above-described similarities, because, unlike the residential employees, they were not required to live with clients or work unusual work schedules.

Lake County clearly does not support the Petitioner's request for two separate residential units, both of which include employees who provide coverage around the clock, nor does it warrant the establishment of separate residential and day program units here, given the particular facts involved. Thus, in the present case, given the commonality of skills and duties, wages, and benefits between the day and residential employees, as well as the contact and interchange between them, the functional integration of the Employer's operations, and the fact that, unlike the union in Lake County, the Petitioner here does seek to represent day program employees, I find that the formation of separate units of day and residential program employees is inappropriate.

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<sup>42</sup> 128 F.3<sup>rd</sup> 1181 (7<sup>th</sup> Cir. 1997).

<sup>43</sup> Neither party had sought this unit.

## **SUPERVISORY STATUS OF THE QMRP**

CLA seeks to include the qualified mental retardation professional (QMRP) in the unit found appropriate, while the Petitioner would exclude her, *inter alia*, on the ground that she is a statutory supervisor because of her authority to adjust grievances.

QMRP Nancy Austin-Lavoie, who reports to ICF/MR Director Rob Moran, facilitates PCP meetings and quarterly reviews for consumers at both Harmony and Forest Green.<sup>44</sup> She monitors consumers' programs and visits the day programs weekly to make sure that the consumers' plans are followed there as well.<sup>45</sup>

Until November 2003, there was a QMRP for each of the two ICF/MR facilities. Until that time, Lavoie and the other QMRP were responsible for doing some performance appraisals and for disciplining certain employees. When the other QMRP left CLA in November 2003, Lavoie became the QMRP for both buildings. At that time, Cummings and Moran assumed Lavoie's role with respect to performance appraisals and discipline. No employees currently report to Lavoie. Lavoie plays no role in approving time off, hiring, firing, suspending, disciplining, transferring, laying off, recalling, promoting, or rewarding employees. If she notices in the monthly data that she reviews that an employee is not implementing a consumer's PCP program correctly,<sup>46</sup> she discusses the matter with the employee's developmental trainer or Moran to see if the employee is giving the right cue or giving it consistently, or she may observe the programming herself.

The QMRP plays no role in CLA's formal grievance procedure described above, but she is responsible for responding to staff concerns regarding working conditions and consumer problems.<sup>47</sup> In this regard, if an employee expresses a concern to her, for example, about a consumer who swears or hits people, she develops a program designed to lessen the consumer's negative behaviors. She must run any such changes in programming by Moran and the consumer's PCP team.

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<sup>44</sup> She has offices at both locations and spends 60 percent of her time at Harmony and 40 percent at Forest Green.

<sup>45</sup> As noted above, QAP Ann Stevens, who works out of the central office, performs a similar function for the consumers in the assisted living residences. The parties have stipulated to exclude her from the appropriate unit. The Employer asserts, however, that this is because Stevens is also the acting director of the day program.

<sup>46</sup> For example, the data she reviews may show that a consumer is not performing a task correctly a certain percentage of the time.

<sup>47</sup> Moran and Cummings testified that there is no current job description for the position. The most recent job description predated the elimination of the QMRP's "supervisory" duties in November 2003 and has never been updated. Cummings testified that it is still the case, as described in the old job description, that the QMRP is to "respond to staff concerns regarding working conditions" and consumer problems.



## Analysis

Pursuant to Section 2(11) of the Act, the term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. Chicago Metallic Corp.<sup>48</sup> The status of a supervisor under the Act is determined by an individual’s duties, not by his title or job classification. New Fern Restorium Co.<sup>49</sup> The burden of proving supervisory status rests on the party alleging that such status exists. NLRB v. Kentucky River Community Care.<sup>50</sup> The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. Quadrex Environmental Co.<sup>51</sup>

The Petitioner asserts that by addressing staff complaints that consumers are hitting them or swearing at them, Lavoie has adjusted their grievances or at least effectively recommended the adjustment of grievances. I find that the QMRP has no statutory authority to adjust or recommend the adjustment of grievances, since she plays no role in CLA’s formal grievance process, and the types of complaints she addresses involve requests to improve the care of consumers, not complaints about personnel issues.

## **MANAGERIAL STATUS, PROFESSIONAL STATUS, AND COMMUNITY OF INTEREST OF THE QMRP AND DIRECTOR OF SOCIAL SERVICES**

In addition to the QMRP, CLA seeks to include the director of social services/LSW in the unit. The Petitioner would exclude both the QMRP and the director of social services on the grounds that they are managerial and/or professional employees, and on the ground that they lack a community of interest with the petitioned-for employees.<sup>52</sup>

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<sup>48</sup> 273 NLRB 1677, 1689 (1985).

<sup>49</sup> 175 NLRB 871 (1969).

<sup>50</sup> 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

<sup>51</sup> 308 NLRB 101, 102 (1992).

<sup>52</sup> There was no stipulation in the record as to the professional or nonprofessional status of the petitioned-for employees, but the Petitioner took the position at the hearing and in its post-hearing brief that the petitioned-for employees are nonprofessionals and that it does not seek to represent professionals. The record does not reveal CLA’s position as to the professional status of either the two disputed positions or the petitioned-for employees.

Mary Pannell, who reports to Cummings, is the director of social services for both Forest Green and Harmony. She has offices in both buildings. Like the QMRP, Pannell attends all PCP meetings and reviews for ICF/MR consumers. She writes reports about consumers. She is frequently in contact with the consumers' guardians, families, and case managers from DHHS and keeps records of her contacts with them. She must discuss any proposed changes in a consumers' plan with the consumers' case manager, guardian, and PCP team. She helps the activity coordinator plan vacations and birthday parties for consumers. She monitors the consumers' personal spending and purchases items for them such as clothing or Christmas gifts. According to her job description, she serves as co-chair of the Admissions Committee. Pannell works 40 hours per week, usually 8 a.m. to 4 p.m.

Forest Green Assistant Administrator Cummings, the director of social services, the QMRP, and the LPN/service coordinator,<sup>53</sup> rotate being the administrator on call every fourth weekend. The administrator on call is the person to whom staff should report incidents of abuse or neglect. The person on call may also perform direct care work as a last resort in the event of a staffing shortage. Within the last six months, Lavoie received a call about some employee misconduct while she was on call. She called Moran and asked if he wanted to deal with it then or wait until Monday, and he said it could wait. Lavoie has called Moran while she was on call to approve overtime.

Lavoie and Pannell attend "management" meetings that take place two to three times a year and are attended by Moran, Cummings, the DTs, and sometimes the shift leaders. At these meetings, they discuss how the programs are going and the general running of the building. Cummings may ask about performance appraisals that are due, how community outings are going, or whether the facilities have enough call-ins.

The QMRP and the director of social services are hourly paid. They are higher paid than the petitioned-for employees, with a scale ranging from \$14.55 to \$18.98. The DTC and LPN, whose pay ranges from \$12.14 to \$15.48, are the only petitioned-for employees whose top step is as high as the bottom step for the QMRP and the director of social services.

Lavoie has worked at CLA for 25 years and has been the QMRP for 10 years. Moran testified that he did not know Lavoie's educational credentials, but that she has some education in the field and years of experience. The most recent job description for the position called for a bachelor's degree in psychology, education, nursing, or other human services field and one year of experience working with the mentally retarded.

Pannell has been CLA's director of social services since at least the 1980's. She is a licensed social worker. Cummings testified that she assumed that Pannell has a four-year degree, but she was not sure. Cummings was unaware whether or not Pannell attended professional school. The job description for the position states that the director of social services must be registered by the Maine State Board of Social Work

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<sup>53</sup> The LPN/service coordinator is in the petitioned-for unit.

Registration or provide written proof of eligibility for examination and registration as an associate social worker within one year of employment. The job description also requires one year of experience working with the mentally retarded and their families.

### Analysis

It is well established that employees will be excluded from the unit as managerial employees only if they formulate and effectuate management policies by expressing and making operative decisions of their employer or have discretion in the performance of their jobs independent of the employer's established policy. NLRB v. Bell Aerospace Co.,<sup>54</sup> Reading Eagle Co.,<sup>55</sup> Ohio River Co.<sup>56</sup> The Petitioner asserts that the QMRP and director of social services are managerial employees because they oversee the implementation of habilitation plans and social work services, participate in various groups that shape services to consumers, and can make decisions within their area of responsibility without referring to established policies. I find that they are not managerial employees, as there is no record evidence that they have ever formulated CLA policies or exercised discretion independent of CLA's established policies.

I find that the QMRP and director of social services share a sufficient community of interest with the petitioned-for employees to require their inclusion in the unit. They work in the same facility as the petitioned-for ICF/MR employees and perform an ancillary role in direct care not unlike that of the LPN/service coordinator, who is included in the petitioned-for unit. The director of social services and the LPN/service coordinator both report directly to Cummings, and the QMRP and DTC, who is in the petitioned-for unit, both report directly to Moran. Although they are higher paid than most of the petitioned-for employees, I find that fact insufficient to defeat their community of interest.

Finally, I find the record insufficient to determine the professional status of either the QMRP or the director of social services. Accordingly, I shall permit them to vote under challenge.

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

**Included:** All full-time and part-time home providers, community guides, personal support staff, individual support staff, program aides, community support coaches, facilitators, team leaders, janitors, drivers,

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<sup>54</sup> 416 U.S. 267 (1974).

<sup>55</sup> 306 NLRB 871 (1992).

<sup>56</sup> 303 NLRB 696, 714 (1991).

transport/janitors, job coaches, resident assistants, DTAs, shift leaders, LPNs, LPN/service coordinator, DTC, housekeeping/laundry workers, cooks, maintenance workers I and II, assistant maintenance supervisor, and vehicle maintenance workers employed by the Employer at its Harmony and Forest Green ICF/MR facilities in Houlton, Maine, at its assisted living residences at Bangor Road in Linneus, Maine and at Corner Home, Duplex North and Duplex South, Joseph Street, High Street, Ruth Road, and Park Street in Houlton, Maine, at its personal support programs at Elm Street, Highland Avenue, and Park Street in Houlton, Maine and in Bridgewater, Maine, and at its day programs and supported employment programs at the Roger Randall Center, the Green Center, New Horizons Enterprises at Main Street and New Horizons Enterprises at Market Square in Houlton, Maine.

**Excluded:** executive director, director of the day program, QAP/interim director of the day program, director of residential services for assisted living, director of residential services for ICF/MR, assistant administrator for ICF/MR, housekeeping supervisor, dietary supervisor, director of nursing, DTs, case manager, habilitation supervisors, supported employment coordinator, home managers, maintenance supervisor, director of human resources, human resources assistant, human resources trainer I and II, human resources assistant, executive assistant, bookkeeper, billing coordinator, office manager, secretary, information systems manager, financial manager, client/employees, professional employees, confidential employees, managerial employees, guards, and supervisors as defined in the Act.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been

permanently replaced. Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by Maine State Employees Association, Service Employees International Union Local 1989, AFL-CIO-CLC.

### **LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc.;<sup>57</sup> NLRB v. Wyman-Gordon Co.<sup>58</sup> Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. North Macon Health Care Facility.<sup>59</sup> In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before March 4, 2005. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by March 11, 2005.

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Rosemary Pye, Regional Director  
First Region  
National Labor Relations Board  
Thomas P. O'Neill, Jr. Federal Building  
10 Causeway Street, Sixth Floor  
Boston, MA 02222-1072

Dated at Boston, Massachusetts  
this 25th day of February, 2005.

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<sup>57</sup> 156 NLRB 1236 (1966).

<sup>58</sup> 394 U.S. 759 (1969).

<sup>59</sup> 315 NLRB 359 (1994).